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PETITION NOT PRINTED

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 70

No. 179

THEODORE GREEN,

Petitioner,

vs.

UNITED STATES.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONER

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CASES:

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Opinions Below

The opinion of the Court of Appeals in No. 70 (R. 34),[1] affirming the judgment of the United States District Court for the District of Massachusetts is reported in 273 F.2d 216. The opinion of the District Court (R. 28) denying the petitioner's motion to vacate sentence under FED. R. CRIM. P. Rule 35 is reported at 24 F.R.D. 130.

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[1] There are separate Transcripts Record in this Court for No. 70 and No. 179, Except where the context makes such specification unnecessary, references to the Transcripts will specify whether the Transcript in No. 70 or No. 179 is referred to.

The opinion of the Court of Appeals in No. 179 (R. 26) affirming the order of the United States District Court is reported at 274 F.2d 59. The memorandum of the District Court (R. 2) denying the motion for correction of sentence under FED. R. CRIM. P. Rule 35 is unreported.

Jurisdiction

The judgment of the Court of Appeals in No. 70 was entered December 8, 1959 (R. 37). The order granting the motion for leave to proceed *in forma pauperis* and granting the petition for a writ of certiorari was granted on April 18, 1960.

The judgment of the Court of Appeals in No. 179 was entered on January 20, 1960. The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari were granted on June 27, 1960.

The jurisdiction of this Court in both cases rests on 28 U.S.C. § 1254(1).

Statute and Rules Involved

The principal statute and rules involved are 18 U.S.C. § 2113 and FEDERAL RULES OF CRIMINAL PROCEDURE Rules 32(a) and 35, which are set out in the Appendix hereto (pp. 39-41). Form 25 of the Appendix to said Rules also is set out in the Appendix hereto (pp. 42-43).

Questions Presented

No. 70

1. Whether FED. R. CRIM. P. Rule 32(a) requires that a sentence be vacated because of the trial judge's failure

to ask the defendant if he had anything to say in his own behalf prior to sentencing.

No. 179

2. Whether a sentence of twenty-five years for aggravated bank robbery is illegal and should be vacated under FED. R. CRIM. P. Rule 35, when prior to imposing it the trial court had already imposed a twenty-year sentence under another count of the indictment charging the same offense without the elements of aggravation specified in 18 U.S.C. § 2113(d).

3. Whether the words "assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device," in 18 U.S.C. § 2113(d) require a finding of objective peril or danger as a prerequisite to the imposition of the twenty-five year sentence therein provided.

4. Whether a sentence of twenty-five years for aggravated bank robbery as provided for in 18 U.S.C. § 2113(d) is illegal and should be corrected under FED. R. CRIM. P. Rule 35 by reducing it to the twenty-year maximum specified in 18 U.S.C. § 2113(a) for unaggravated bank robbery, where the conviction for the aggravated offense was returned in response to instructions which did not require the jury to find the elements of aggravation specified in 18 U.S.C. § 2113(d).

Statement of the Case

The petitioner together with two others was tried by jury in the Federal District Court for Massachusetts on his plea of not guilty to a three count indictment charging that the defendants did: (1) enter a bank with intent to commit a felony in violation of 18 U.S.C. § 2113(a); (2) rob

the bank, also in violation of 18 U.S.C. § 2113(a); and (3) in committing the robbery, assault and put in jeopardy the lives of certain persons by the use of a dangerous weapon or device, in violation of 18 U.S.C. § 2113(d). One of the defendants entered a plea of guilty and became a prosecution witness.

In the trial judge's charge to the jury he made several statements with respect to what was required to be found to convict under Count 3. The substance of these statements, which are set forth verbatim on pages 31-32 below, was that the defendants should be convicted under Count 3 if the jury found that they committed the robbery by the use of a dangerous weapon; or that in the course of the robbery they put persons in fear by the use of a dangerous weapon. In one reference to Count 3 the trial judge instructed the jury that there was no contention that the robbery had not been committed in an aggravated manner; and, apparently still referring to that count, that the issue was whether the defendants were the persons who robbed the bank.

Both defendants who stood trial were convicted on all three counts.

The sentencing of the defendants came at the end of a hearing in which arguments and rulings on a motion in arrest of judgment and a motion for a new trial were interspersed with statements by counsel and the judge concerning sentencing. The judge's statement explaining his attitude in imposing sentence concluded as follows (No. 70, R. 22-23):

> "They deserve no consideration. They are what I call mad men. The only protection society has got is to wall them off, fence them off from society just as long as the Court is able to do it. There isn't one

word that can be said in their defense. There is not one word that can be said, I think properly, that would warrant a Court in believing these men could be rehabilitated.

"Their records date back for the years almost without end—30 years back as far as Jacobanis is concerned—1923, and the record of Green goes back to 1931. Serious crimes: Robbery, larceny, breaking and entering, use of guns all over their entire careers.

"Mr. Clerk—"

The court and clerk conferred. Then the clerk announced Jacobanis' sentence and announced Green's sentence as follows (No. 70, R. 23):

"Theodore Green, the Court orders that on this indictment you be sentenced as follows: On Count 1 of the indictment 20 years, on Count 2 of the indictment that you be imprisoned for 20 years, and on Count 3 of the indictment that you be imprisoned for the period of 25 years, said prison sentence to run concurrent and to begin upon your release from prison upon the sentence you are now receiving under order of the State Court."

At no time did the trial judge ask either defendant if he wished to speak in his own behalf; nor did he say anything which indicated that he was ready or willing to hear from either defendant personally. An instrument was executed by the trial judge and the Clerk in the form set forth as Form 25 following the FEDERAL RULES OF CRIMINAL PROCEDURE containing the following statement:

". . . and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary

being shown or appearing to the Court. . . ." (No. 70, R. 24).

No. 70 originated with a motion by the petitioner *pro se* to vacate sentence under FED. R. CRIM. P. Rule 35 on three grounds, the third of which was that the judge did not afford the petitioner an opportunity to speak before imposition of the sentence as required by FED. R. CRIM. P. Rule 32(a). This motion was denied by the district court for the District of Massachusetts in an opinion dated June 15, 1959, 24 F.R.D. 130 (R. 28), reasoning with respect to the third ground that where the court listened to counsel, and there was no indication that it was not prepared to listen to the defendant himself, the defendant had been afforded the opportunity to speak, and further that the petitioner had not shown that if he had been offered the opportunity to speak in person he would have added anything to what his counsel already had said. The district court's judgment was affirmed by the court of appeals on December 8, 1959 with an opinion holding that FED. R. CRIM. P. Rule 32(a) does not require "personal solicitation of a defendant to speak in his own behalf when he is represented by competent and experienced counsel of his own choice" who has spoken at length for his client in mitigation of punishment, 273 F.2d 216 (R. 34). On April 18, 1960, this Court granted the petitioner's motion for leave to proceed *in forma pauperis* and petition for writ of certiorari, but limited the grant to the single question "[w]hether the judgment was invalidated where the court did not offer the petitioner an opportunity to speak before sentence was imposed".

No. 179 originated with a separate motion by petitioner *pro se* to correct sentence pursuant to FED. R. CRIM. P. Rule 35 on two grounds: first, that when the court imposed a 20-year sentence on Count 1 it exhausted its power, and

the 25-year sentence on Count 3 was therefore invalid; and second, that the sentence on Count 3 was invalid because the jury was not properly instructed, and no verdict was returned which required a finding of the facts specified in 18 U.S.C. § 2113(d) to support a 25-year sentence. The district court denied the motion in a memorandum dated October 15, 1959 (R. 2) holding that the sentences on the three counts were imposed simultaneously and the petitioner was not entitled to have the longest sentence set aside, and that the argument regarding the propriety of instructions to the jury could not be raised by motion under FED. R. CRIM. P. Rule 35 and was without merit in any case. This decision was affirmed by the court of appeals in an opinion dated January 20, 1960, 274 F.2d 59 (R. 26). This Court granted petitioner's motion to proceed *in forma pauperis* and his petition for writ of certiorari on June 27, 1960 (R. 30).

Summary of Argument

No. 70

Rule 32(a) requires that the judge specifically ask the defendant if he has anything to say in his own behalf prior to sentencing, whether or not the defendant is represented by counsel. This right to speak prior to the imposition of judgment, known as the *allocutus*, had its origin in the early common law, and the essence of that right has always been the specific offer by the court of an opportunity to speak. Rule 32(a) is designed to continue that right in the federal courts without diminution. The words "in his own behalf" in the rule confirm that a statement by counsel is no substitute for a statement by the defendant himself; and the language of Form 25 in the Appendix to the Rules confirms that the duty of a trial judge to make

affirmative inquiry of the defendant is to be continued under the Rules.

While present criminal practice provides other opportunities for the presentation of legal defenses which would ordinarily have been asserted through the *allocutus* at early common law, modern concepts relating to criminal sentences make a personal statement by the defendant prior to sentencing peculiarly significant. It is the trial judge's duty to try to make some evaluation of the character of the accused as a basis for determining sentence and in this connection he should make an effort to hear the defendant speak for himself. The failure to offer the opportunity to speak denies the defendant an historic and important right and requires that the case be remanded for resentencing.

No. 179

Counts 2 and 3 clearly refer to but one offense—bank robbery. It is quite apparent that only one sentence may legally be imposed for this single offense. Therefore after imposing a 20-year sentence on Count 2 the trial judge had no power to impose a 25-year sentence for the same offense on Count 3 and the latter offense should be vacated. The imposition of multiple sentences for a single offense is at best a slipshod procedure which shows that the trial judge had an erroneous view of the law at the time of sentencing. At the very least, therefore, the multiple and contradictory sentences for a single offense should be vacated and the case returned to the district court with directions to impose a single sentence.

The essence of the aggravation which under 18 U.S.C. § 2113(d) authorizes an increase in the maxi-

mum sentence for bank robbery from 20 to 25 years, is the use of a dangerous weapon in such a manner as to create an objective state of peril and danger. The trial judge in this case authorized the jury to convict under Count 3 if, in the course of robbery, persons were put in *fear* by the use of a dangerous weapon. In view of this statement and his subsequent erroneous statement indicating that aggravation was not in issue, the effect of the charge was to make the petitioner's conviction on Count 3 simply another conviction of unaggravated bank robbery, for which the maximum permissible sentence was 20 years. Since the defendant does not seek to upset his conviction but only to bring his sentence into conformity with the statute for the offense of which he was actually convicted, relief under FED. R. CRIM. P. Rule 35 is appropriate.

ARGUMENT

I (No. 70)

The Sentences Imposed Upon Petitioner Are Illegal and Should Be Vacated Because of the Trial Judge's Failure to Ask the Petitioner if He Had Anything to Say Prior to Sentence in Accordance With Rule 32(a) of the Federal Rules of Criminal Procedure.

The last sentence of Rule 32(a) of the FEDERAL RULES OF CRIMINAL PROCEDURE reads as follows:

> "Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment."

In the instant case the trial court did not ask the petitioner if he had anything to say in his own behalf before sentencing, although counsel for the petitioner did speak briefly on the question of sentence. The petitioner believes that the quoted language of Rule 32(a) has not been complied with. He contends therefore that the sentence imposed upon him should be set aside and that he should be brought before the district court for resentencing, at which time he should be afforded an opportunity personally to speak in his own behalf before sentence is pronounced.

A. *The Right of Allocution Embodied in Rule 32(a) Requires That the Trial Judge Ask the Defendant if He Has Anything to Say Before Sentence Is Pronounced.*

The right of the defendant to speak to the court prior to imposition of sentence—known in the common law as the *allocutus* or allocution—has been a fundamental right of the accused since the early days of the common law. At the end of the 17th Century it was already recognized that the court's failure to ask the accused if he had anything to say before sentence was imposed required reversal. See *Anonymous*, 3 Mod. 265, 266, 87 Eng. Rep. 175 (K.B. 1689) ("and it does not appear that the party was asked what he could say why sentence of death shall not be spoken . . . Attainder reversed"); *Rex* v. *Geary*, 2 Salk. 630, 91 Eng. Rep. 532 (K.B. 1689); *King* v. *Speke*, 3 Salk. 358, 91 Eng. Rep. 872 (K.B. 1689). See also *Earl of Leicester* v. *Heyden*, 1 Plow. 384, 387, 75 Eng. Rep. 582 (K.B. 1571), referring to offering accused opportunity to speak in a case in 1554.

Chitty has described the *allocutus* in the following terms:

> "It is now indispensibly necessary, even in clergyable felonies, that the defendant should be asked by the clerk if he has anything to say why judgment of

death should not be pronounced on him; and it is material that this appear upon the record to have been done; and its omission after judgment in high treason will be a sufficient ground for the reversal of the attainder. On this occasion, he may allege any ground in arrest of judgment; or may plead a pardon if he has obtained one, for it will still have the same consequences which it would have produced before conviction, the stopping of the attainder. If he has nothing to urge in bar, he frequently addresses the court in mitigation of his conduct, and desires their intercession with the king or casts himself upon their mercy." 1 CHITTY, CRIMINAL LAW 700 (1816).

See also 4 BLACKSTONE, COMMENTARIES 375 (Lewis ed. 1897).

From early English cases, the right of allocution follows a clear course into American law. See *Ball* v. *United States*, 140 U.S. 118, 131, where this Court stated that the great weight of authority in this country was that a judgment and sentence must be set aside if the defendant has not been asked if there was any reason why sentence should not be pronounced. See also *Schwab* v. *Berggren*, 143 U.S. 442; *People* v. *Nesce*, 201 N.Y. 111, 113, 94 N.E. 655, 656 (1911):

"It has been one of the indispensable requirements of the common law that no person should have the sentence of death passed against him without first being given the opportunity to personally speak for himself and show cause, if he can, why sentence should not be pronounced against him. This right has been jealously guarded from very ancient times."

The *allocutus* originated at a time when most crimes were capital felonies and the accused did not have the right

to counsel or even the right to address the court prior to conviction. See 1 STEPHEN, HISTORY OF CRIMINAL LAW IN ENGLAND, 304 (1883). However, such a right in some form has continued to exist in modern times in most of the states, and in many instances is applicable to noncapital crimes. 2 BISHOP, CRIMINAL PROCEDURE § 1293 (2d ed. 1913); ALI CODE OF CRIMINAL PROCEDURE, Commentary on § 389 (Official Draft 1931); Barrett, *Allocution*, 9 Mo. L. Rev. 115 & 232 (1944).

Since its earliest appearance in the common law, the essence of the *allocutus* has been the putting of the question by the judge. The obvious reason for this is that unless it is clear that the judge has asked the defendant if he wishes to be heard, there is no way of determining with certainty that an effective opportunity to address the court has been granted. It has therefore been deemed a necessary incident of this right that the record show that the question was put to the accused by the judge. *Rex* v. *Geary*, 2 Salk. 630, 91 Eng. Rep. 532 (K.B. 1689); *Ball* v. *United States*, 140 U.S. 118, 130; 2 BISHOP, CRIMINAL PROCEDURE § 1358 (2d ed. 1913); *Gadsden* v. *United States*, 223 F.2d 627, 632 (D.C. Cir. 1955); *Graham* v. *People*, 63 Barb. 468, 478-479 (N.Y. Sup. Ct. 1872):

> "... it is not sufficient that the records of the court show a conviction and sentence. It is not to be presumed from these, that the practice of asking the prisoner, before sentence, what he had to say, etc., has been complied with, but it is necessary that a compliance with the prerequisite to the validity of the sentence should be made expressly to appear, on a writ of error, by a distinct statement in the record of the court below."

It is perfectly clear that the Advisory Committee which proposed the FEDERAL RULES OF CRIMINAL PROCEDURE in-

tended to preserve as a right the traditional *allocutus*, although broadened by the express language of Rules 1 and 2 so as to apply to all crimes whether felonies or misdemeanors and regardless of available punishment. See Comments on Proposed Rule 30(a), *Report of the Advisory Committee on Federal Rules of Criminal Procedure, Preliminary Draft*, p. 183, March, 1943. One member of the Advisory Committee has explained Rule 32(a) as follows: "The requirement of this Rule 32(a) for sentence 'without unreasonable delay' and with opportunity to the defendant to make a statement before sentence accords with IV Bl. Comm. 375" (the reference being to Blackstone's description of the *allocutus*). Longsdorf, *Beginnings and Background of Federal Criminal Procedure*, 4 BARRON, FEDERAL PRACTICE AND PROCEDURE 53 (1951).

There is not the slightest indication in the background or language of Rule 32(a) that there was any intention to depart from the historic procedure of the court's putting a simple and specific question to the defendant. Furthermore, the language of the suggested Judgment and Commitment Form (Form 25) adopted as part of the Appendix to the Rules, shows clearly the procedure which Rule 32(a) envisioned. That form which is to be signed by the judge after sentencing includes the following recital:

> "... and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the court...."

This recital is completely consistent with common law *allocutus*.[2] It makes it perfectly clear that the courts are

[2] Compare the language of Form 25 with that used in *King* v. *Speke*, 3 Salk. 358, 91 Eng. Rep. 872 (K.B. 1689) (attainder reversed because accused was not asked "what he had to say for himself, why judgment should not be given").

to "afford . . . an opportunity" under Rule 32(a) by *asking* the defendant if he has anything to say on his own behalf. That the Forms are not mandatory (see FED. R. CRIM. P. Rule 58) does not detract from their usefulness as a guide to interpretation. Form 25 was adopted at the same time as Rule 32(a) and they could not have been intended to have conflicting meanings.

See also 12 CYCLOPEDIA OF FEDERAL PROCEDURE § 50.16 (3d ed. 1952):

> "Under the Rule, the trial judge is required to afford the defendant an opportunity to make a statement, and the judge should ask the defendant whether he desires to make one."

The courts of appeal which have considered whether Rule 32(a) makes it mandatory that the trial judge ask the defendant if he has anything to say before sentencing have reached varying results. The Court of Appeals for the District of Columbia sitting *en banc* has ruled, in a decision which it held was to be given prospective effect only, that the trial court must specifically ask the defendant if he has anything to say. *Couch* v. *United States*, 235 F.2d 519 (D.C. Cir. 1956). See also *Howard* v. *United States*, 247 F.2d 537 (D.C. Cir. 1957), *summarily rev'd and remanded*, 356 U.S. 25; *Hudson* v. *United States*, 229 F.2d 36 (D.C. Cir. 1956); *Gadsden* v. *United States*, 223 F.2d 627 (D.C. Cir. 1955); *Jenkins* v. *United States*, 249 F.2d 105 (D.C. Cir. 1957). The Court of Appeals for the Sixth Circuit held in *Sandroff* v. *United States*, 174 F.2d 1014, 1020 (6th Cir. 1949), *cert. denied*, 358 U.S. 947, that the question, "Anything further?" sufficed to afford the opportunity to be heard, apparently on the implicit premise that a failure by the trial judge to make some inquiry would not have complied with the Rule. The Courts of

Appeal for the Tenth Circuit in *Calvaresi* v. *United States*, 216 F.2d 891, 901 (10th Cir. 1954), *rev'd summarily*, 348 U.S. 961, and the First Circuit in the instant case have held that Rule 32(a) does not impose an affirmative duty on the judge to ask the defendant if he wishes to speak. The court below in the instant case indicated, however, that it thought the putting of an affirmative question would be better practice. In *Mixon* v. *United States*, 214 F.2d 364 (5th Cir. 1954), the court held that the defendant waived his right to object to the judge's failure to ask the question by not taking an appeal.

The federal decisions which have concluded that the trial judge need not put an affirmative question to the defendant appear to be based on the notion that where counsel speaks and the defendant does not, the defendant has waived the right and it will be assumed that he had nothing he wished to say. See, *e.g.*, opinion below (No. 70, R. 34-36). But the right of allocution is the right to be invited to speak; by its nature, it cannot be waived by silence. Thus, the New York courts in construing § 480 of the NEW YORK CODE OF CRIMINAL PROCEDURE, to which the comments of the Advisory Committee on the Criminal Rules refer, see *supra*, p. 13, have consistently held that the putting of the question is "mandatory" and cannot be waived. See, *e.g.*, *People* v. *Martin*, 1 N.Y. 2d 406, 135 N.E. 2d 711 (1956). Accord *State* v. *Ausberry*, 83 Ohio App. 514, 82 N.E. 2d 751 (1948).

In view of the nature of the issues involved in sentencing, a statement by counsel on the defendant's behalf is no substitute for a personal statement by the defendant himself. On its face the last sentence of Rule 32(a) seems perfectly clear that the right which it grants is personal to the defendant. Had it been intended that a statement by counsel would be a substitute for the defendant's right

to speak himself the words "in his own behalf" would be superfluous and misleading. These words seem ideally suited to describe the situation where a defendant's counsel may speak on his client's behalf, and then the defendant himself is offered a chance to speak in his "own" behalf.

The use of the word "defendant" elsewhere in the Rules where context and normal trial practice make it clear that the particular action described may be taken by counsel is irrelevant.[3] The language of Rule 32(a) and Form 25, particularly as viewed against the historical background of the *allocutus*, clearly look to a personal right. Indeed, it would do no less violence to common sense and the normal meaning of words to read out of Rule 32(a) the words "in his own behalf" than it would to interpret Rule 43, requiring that "the defendant shall be present", as permitting his presence through counsel, which clearly it does not. See *Crowe* v. *United States*, 200 F.2d 526 (6th Cir. 1952). See also *Lewis* v. *United States*, 146 U.S. 370.

B. *The Duty of the Judge to Invite the Defendant to Speak Before Sentencing Is of Particular Importance in View of the Judge's Broad Discretion in Sentencing.*

The accused's right to address the court before sentence is imposed assumes special significance in the light of present views concerning punishment for crime. The *allocutus* is less significant now than in times past as an opportunity to present such pleas as wrong identity, receipt of a pardon, insanity and pregnancy. But the broadened discretion of the judge in sentencing and the recognition

[3] E.g. Rule 7(d): "The court on motion of the defendant may strike surplusage from the indictment or information;" Rule 16 providing for an order permitting inspection of books, etc. "upon motion of a defendant".

that the nature of the crime should not be the sole factor in determining punishment make it essential that the judge make an evaluation of the accused, the forces that led him to crime and the likelihood of his rehabilitation.

In imposing sentence, the judge abandons his role as an essentially passive arbitrator between the parties within the relatively clear limits of trial procedure. Rules of evidence are discarded in the interest of bringing before the judge whatever may bear on his evaluation of the character and personality of the defendant and his prediction or educated guess as to the likelihood of rehabilitation. And this Court has held that he need not disclose to the defendant or his counsel either the sources or the substance of information relied on. *Williams* v. *New York*, 337 U.S. 241, *petitions for rehearing denied*, 337 U.S. 961, 338 U.S. 841.[4]

If the trial judge is not to be limited in his sources of information, it is corollary to this that he has a *duty* to consider with an open mind whatever may be available to shed light on his decision. Surely he ought not to be slipshod, as was the judge in this case, in seeking such insight as a statement from the defendant might provide. It is not contended that the *allocutus* should be the sole or dominant basis for determining punishment or that it will always prove useful. Undoubtedly, in many cases the defendant will decline even an explicit invitation to speak—or if he does speak will offer nothing significant. But there will be cases where what the defendant says will raise questions in the judge's mind concerning material in the presentence report or put that material into a different

[4] This Court rejected the suggestion of the Advisory Committee on the Criminal Rules which would have made the presentence report available both to the prosecution and the defense. Compare Rule 34(c)(2), *Report of the Advisory Committee on the Federal Rules of Criminal Procedure* (1944), with Rule 32(c) as promulgated by the Court and now in effect.

perspective. Furthermore, what the judge hears may add a new dimension to his judgment of the character of the accused. It has been recognized that an opportunity to observe and hear the accused is an important element in making a comprehensive evaluation. See, *e.g.*, Hayner, *Sentencing by an Administrative Board*, 23 Law and Contemp. Prob. 477 (1958).[5] Cf. Allport, *The Trend in Motivational Theory*, 23 Am. Jour. of Orthopsychiatry 107, 112 (1953) ("To ask a man his motives, however, is not the only type of 'direct' method we may employ. It is, however, a good one—especially to start with".) In over 85% of Federal criminal cases the defendant pleads guilty. *Hearings on Federal Sentencing Procedure Before Subcommittee No. 3 of the House Committee on the Judiciary*, 85th Cong., 2d Sess. 30 (1958). And in many of those that go to trial, the defendant does not testify. Thus, without a statement before sentencing the judge may have no opportunity at all to hear the defendant speak.

The right to speak on the subject of sentence is the defendant's last opportunity to soften his punishment. Contrary to what the court below suggested (see last sentence of opinion, No. 70, R. 36), the observance of this right should not turn on whether or not it is likely that what the accused has to say will influence the judge in any particular case, any more than the right to a fair trial turns on the statistical probability of acquittal.

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[5] In describing both the pitfalls and advantage of an interview as the basis for determining appropriate sentence, this author states (p. 490):

"Another aspect of Board hearings to remember is that prisoners have time. Many of them use this time thinking about the personality of the Board and figuring out what 'line' would be most effective. The more intelligent may try their best to 'con' the Board. . . . One should not be too critical, however. It is better to be 'conned' occasionally than to discourage a man with an honest story."

In view of the sentencing court's sweeping power it is essential that there be punctilious observance of such procedural protections as the law affords the defendant. See *Townsend* v. *Burke*, 334 U.S. 736. The language of this Court in *Vitarelli* v. *Seaton*, 359 U.S. 535, 540, relating to administrative proceedings, is in many respects applicable here:

> "For in proceedings of this nature, in which the ordinary rules of evidence do not apply, in which matters involving the disclosure of confidential information are withheld, and when it must be recognized that counsel is under practical constraints in the making of objections and in the tactical handling of his case which would not obtain in a case being tried in a court of law before trained judges, scrupulous observance of departmental procedural safeguards is clearly of particular importance." See *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88-89.

In sentencing, where human life and liberty are involved, where the discretion of the tribunal is broader and where the granting of full procedural rights imposes no significant burden, an even stronger case exists in fundamental justice for insisting on full compliance with such rights.

In view of the purpose of the *allocutus*, it is obvious that an opportunity for the defendant's counsel to make a statement concerning sentence is no substitute for the judge's putting the question directly to the defendant. Even the most thorough and careful lawyer is unlikely to have learned everything which may be relevant to his client's background and character. Statements may be made by the prosecuting attorney or the judge during the presentencing hearing relating to matters completely unknown to counsel and ordinarily counsel will not have seen the

probation officer's report. And obviously as a practical matter the extent to which counsel can effectively exercise the defendant's right of allocution will be further limited where, as in more than 25% of federal criminal cases last year, counsel has been appointed by the court. See *Report of the Administrative Office of the United States Courts*, Table D 5, 239-240 (1959). See *Couch* v. *United States*, 235 F.2d 519 (D.C. Cir. 1956). It thus seems both unrealistic and unfair to hold that the granting of an opportunity to a defendant's counsel to address the court complies with Rule 32(a).

In addition to the background, text and purpose of the Rules, there is an obvious practical reason why the trial court should affirmatively offer the accused an opportunity to address the court. In many cases the defendant will be most reluctant at the critical moment of sentence to risk incurring the judge's annoyance by interjecting an unsolicited statement. And whether the risk is real or imagined is not what matters for these purposes. In either event, its deterrent effect—particularly on defendants not yet hardened to criminal trials or not prone to speech-making—is obvious. Thus, to shift from the trial judge the burden of securing to the defendant the "opportunity" to make a statement, is for many defendants to deprive them of the opportunity. As one federal judge has said:

> "After being convicted, the defendant is usually so crushed as to hestitate to make demands lest they bring increased punishment. The rule contemplates no such demand, and clearly without the necessity of any demand at that stage of the trial, the defendant's legal rights should be accorded to him by the court." Rives, J. concurring specially in *Mixon* v. *United States*, 214 F.2d 364, 366 (5th Cir. 1954). Cf. *Hibdon* v. *United States*, 204 F.2d 834, 839 (6th Cir. 1953).

That it is difficult enough to get defendants to exercise their right to be heard when it is specifically offered to them, without requiring them to intrude themselves uninvited into the proceedings, is borne out by recent testimony of another federal judge describing his conduct of the sentencing portion of the trial:

> "I listened to what the United States Attorney had to say, and then I listened to what the various counsel for the defendants had to say. Then of course, I listened to the defendants, but it is very difficult to get them to say anything." Testimony of Biggs, J., *Hearing on Federal Sentencing Procedure Before Subcommittee No. 3 of the House Committee on the Judiciary*, 85th Cong., 2d Sess. 23 (1958).

The proceedings before the sentencing judge in the instant case exemplify the defendant's dilemma and the wisdom of requiring that the judge affirmatively ask the defendant if he wishes to speak. After the prosecuting officer and respective counsel for the defendants had spoken briefly, the judge made a statement bitterly critical of the defendants in which he indicated the basis for his imposing the maximum available sentence (No. 70, R. 22-23). In the course of this statement he said, "They deserve no consideration . . . There isn't one word that can be said in their defense"—hardly an invitation to the petitioner to speak in his own behalf. After the judge's statement and without any pause in the proceedings sentence was pronounced. It would have taken a stout-hearted, perhaps foolhardy, defendant to interrupt the judge at this stage. Since there was no indication prior to the actual pronouncement of sentence that the judge would be willing to hear from the defendant—or even any basis on which the defendant or his counsel could determine *when* he should speak if he dared to do so—it is impossible to select any

point in the proceedings at which it can fairly be said that the petitioner was "afforded the opportunity" to speak.*

The trial judge showed his total lack of concern with the petitioner's rights under Rule 32(a) by signing a Judgment and Commitment Form reciting that he had "asked the defendant whether he has anything to say why judgment should not be pronounced" (No. 70, R. 24-25). The record is clear, and the Government conceded in its brief in the court below, that no such question was ever asked.

As shown above, there are compelling reasons in fairness and in history and on the basis of a sound reading of Rule 32(a) itself for this Court to hold that the Rule requires that the trial judge ask the defendant if he has anything to say before sentence is pronounced. The asking of the question imposes no significant burden on the court and no special form of words is required. Where the question has not been asked a new trial is not required to secure the defendant's right to address the court. What is necessary is to remand for resentencing and to instruct the trial judge to ask the petitioner if he wishes to be heard. It is urged that the failure to comply with Rule 32(a) invalidates the

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* The difficulty which the defendant would have had in knowing *when* to speak was aggravated in this case by the highly confusing chronological progression of the proceeding culminating in sentence, as is shown by the following outline (page references are to Record in No. 70):

1. Argument on motion in arrest of judgment (R. 4-8).
2. Motion in arrest of judgment and motion for new trial denied (R. 8).
3. U. S. Attorney's statement on sentence (R. 8-10).
4. Argument on motion for new trial (R. 10-18).
5. Statement by Green's counsel re sentence (R. 18-19).
6. Statement by Jacobanis' counsel re sentence (R. 19-20).
7. Statement by court denying motion for new trial (R. 21-22).
8. Statement by court on sentence and imposition of sentence (R. 22-23).

sentence and makes the relief sought here pursuant to Rule 35 appropriate. It is further urged that in fairness the trial court should be instructed that in imposing the new sentence it should give credit for that portion of the sentence which the petitioner has already served and that for purposes of parole and good-time credits the new sentence should be deemed to run from the date of the original sentences. See pp. 36-37, *infra*.

II (No. 179)

The Twenty Five Year Sentence on Count 3 Was Illegal and Should Be Vacated Under Fed. R. Crim. P. Rule 35.

In No. 179 petitioner has moved the district court under FED. R. CRIM. P. RULE 35 to correct an illegal sentence by vacating the 25-year sentence on Count 3. The first ground for the motion is that the sentence on Count 3 is illegal, because the court had already exhausted its power to impose sentence. The second ground is that because of the way in which the issue was put to the jury, the conviction under Count 3 would authorize only a 20-year sentence in any event.

A. *Imposition of a Twenty-Five Year Sentence on Count 3 Was Illegal Because the Trial Court Had Exhausted Its Power to Sentence.*

It is clear that Counts 2 and 3 of the indictment in this case charged petitioner with only one offense. 18 U.S.C. § 2113(d) provides that "whoever, *in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section*, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be . . . imprisoned not more than twenty-five years". (Emphasis supplied.) Thus §2113(d)

does not create an additional offense but only increases the maximum punishment which may be imposed for any of the offenses defined in §2113 if they are committed in the aggravated manner. The Government has conceded as much. See *Holiday* v. *Johnston*, 313 U.S. 342, 349. See also *Peeler* v. *United States*, 163 F.2d 823, 824 (10th Cir. 1947); Annotation, 59 A.L.R. 2d 946, 992-994 (1958). Since Counts 2 and 3 charged only a single offense and the offense could only be punished once, the imposition of separate sentences on Counts 2 and 3 was erroneous and illegal.[7]

When two sentences are imposed for one offense, either sentence standing alone being a lawful sentence, petitioner submits that the first sentence imposed should stand, and that any attempt thereafter to impose another sentence

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[7] In his original motion under Rule 35 and in his petition for certiorari, petitioner took the position that the trial court's power to sentence was exhausted on imposition of the 20-year sentence under Count 1. In *Prince* v. *United States*, 352 U.S. 322, this Court held that consecutive sentences could not be imposed for entering a bank with intent to rob it and for consummation of the robbery. The language in that case suggests that entry with intent to rob is merged in the robbery when consummated and that for sentencing purposes the entry and robbery constitute but one offense. 352 U.S. at 328. However, the point need not be labored here, because it is clear on any theory that Counts 2 and 3 charge but one offense, and the twenty-five year sentence is equally void whether the trial court exhausted its power upon imposition of sentence with respect to Count 1 or Count 2.

Prince has been read by some courts as indicating that a charge of bank robbery under §2113(a) is merged in another count charging that the offense was committed in the aggravated manner specified in §2113(d). But §2113(d) does not specify a separate offense into which a robbery laid under §2113(a) can be said to merge. In any event the merger theory has only to do with the number of offenses for which sentence may legally be imposed and is not useful in choosing which of two sentences should stand when only one was authorized. Compare *United States* v. *DiCanio*, 245 F.2d 713 (2d Cir. 1957), *cert. denied*, 355 U.S. 874, with *United States* v. *Leather*, 271 F.2d 80 (7th Cir. 1959), *cert. denied*, 363 U.S. 831.

should be considered and declared to be void. The trial court has power to impose only one sentence. When a legal sentence is imposed the court's power is exhausted. Its only remaining power is the power under FED. R. CRIM. P. Rule 35 to reduce the sentence imposed; it has no power to impose a second sentence or to increase the sentence legally imposed. In *Holbrook* v. *Hunter*, 149 F.2d 230, 232 (10th Cir. 1945), the court said: "[T]he most that can be said is that when the court imposed the sentence of 20 years on Count 1, it exhausted its power to sentence, and the sentence on Count 2 was void." And while that was a case where the longer sentence was imposed first, it hardly seems appropriate to apply the exhaustion doctrine only where it happens to produce the most severe sentence. See *United States* v. *Sims*, 72 F. Supp. 631 (W. D. Mo. 1946). A holding that the first legal sentence shall prevail and that any subsequent sentence attempted to be imposed for the same offense is void provides a straightforward rule by which the confusion which has surrounded multiple sentencing for offenses under 18 U.S.C. § 2113 can be eliminated. In any event, it would be more consistent with the doctrine of lenity to hold here that where multiple sentences are improper, but one standing alone would be authorized, the shortest should prevail. Cf., *e.g.*, *Heflin* v. *United States*, 358 U.S. 415, 419; *Bell* v. *United States*, 349 U.S. 81.

While a litigant may have to suffer the consequences of errors of law which he or his counsel make, extra hardship should not be inflicted upon him as a result of the error of the trial court in imposing multiple sentences. For, as noted below, simply to affirm the longest sentence imposed is to guess at what the trial judge would have done had he known there was only one offense. And sending the case back for resentencing, unless correction is made *nunc pro tunc*, will be prejudicial to the defendant in computation of the time when he will be eligible for parole, even if credit is given

for time already served. See 18 U.S.C. §4202; *Howell* v. *United States*, 103 F. Supp. 714 (D.C. W. Va. S.D. 1952), *aff'd per curiam*, 199 F.2d 366 (4th Cir. 1952); *United States* v. *Patterson*, 29 Fed. 775 (C.C. N.J. 1887) (opinion of Mr. Justice Bradley). Therefore, and particularly in view of the prejudicial effect of the trial judge's charge to the jury (see Part B, *infra*), the Court "in the exercise of its supervisory power over the administration of justice in the lower federal courts" (*Yates* v. *United States*, 356 U.S. 363, 366-67; *McNabb* v. *United States*, 318 U.S. 332), should hold that the trial judge was limited to the imposition of the first legally sufficient sentence uttered and that his power to sentence this defendant was thereupon exhausted.

At the very least, in view of the confusion inherent in the imposition of inconsistent sentences for a single offense, the case should be returned to the district court to impose a single sentence for the offense of which petitioner was convicted. Simply to affirm the longest sentence imposed as did the court below is to act upon speculation as to what the trial judge would have done. Such a holding would be inconsistent with the strict requirements of certainty and fairness in sentencing matters which have always been recognized by this Court. See, *e.g.*, *Townsend* v. *Burke*, 334 U.S. 736; *Nilva* v. *United States*, 352 U.S. 385; *Husty* v. *United States*, 282 U.S. 694.

This Court's decision in *Yates* v. *United States*, 355 U.S. 66, is directly in point. In that case, the Court concluded that eleven refusals to answer questions, for which the trial judge had imposed eleven one-year contempt sentences to run concurrently, constituted only a single punishable offense. Had the Court employed the reasoning of the court below in the instant case, it would have characterized the error as "technical" and affirmed the one-year sentence. Instead, the Court remanded for resentencing noting that:

"While the sentences imposed were concurrent, it may be that the court's judgment as to the proper penalty was affected by the view that petitioner had committed 11 separate contempts." 355 U.S. at 75.

See also *United States* v. *Hines*, 256 F.2d 561 (2d Cir. 1958).

Similarly in the instant case the sentencing judge may have been influenced in choosing a 25-year sentence by its error in believing that there were three separate offenses to be considered in sentencing. See *Yasui* v. *United States*, 320 U.S. 115, 117; *Nilva* v. *United States*, 352 U.S. 385, 396. It is unfair to the petitioner to assume that the judge would have imposed the same 25-year sentence had he known he could impose only one sentence; just as it would be unfair to the Government to assume that the judge would have imposed either one-third or 25/65ths of the maximum allowable sentence of 25 years had he been correct on the law. The appellate courts are simply not in a position to know what was in the trial judge's mind and they "should not be called upon to speculate." *Simunov* v. *United States*, 162 F.2d 314, 315 (6th Cir. 1947). Therefore, the case should, at least, be remanded for resentencing.

It should also be noted that the assumption of the court below that the petitioner would not be affected by the "technical" error of multiple concurrent sentences is incorrect. It seems clear, for instance, that even where a number of concurrent sentences relate to the same transaction, the opportunity for parole may be adversely affected. See *United States* v. *Hines*, *supra*, at p. 563; *Audett* v. *United States*, 265 F.2d 837, 848 (9th Cir. 1959), *cert. denied*, 361 U.S. 815, *petition for rehearing denied*, 361 U.S. 926; *Hibdon* v. *United States*, 204 F.2d 834, 839 (6th Cir. 1953).

B. *The Trial Judge's Charge to the Jury on Count 3 Failed to Define the Aggravated Form of Bank Robbery Specified in 18 U.S.C. Section 2113(d) and Therefore the Conviction Amounted Only to Another Conviction for Unaggravated Bank Robbery for Which the Maximum Sentence Is 20 Years.*

The trial judge's charge to the jury did not define the aggravated offense set forth in § 2113(d), because it did not require the jury to find that any person was in fact in danger of harm from the use of a dangerous weapon. This being the case, the jury verdict under Count 3 was simply another conviction for unaggravated bank robbery for which the maximum sentence is 20 years.

18 U.S.C. § 2113(a) prescribes a twenty-year maximum sentence for "whoever, *by force and violence, or by intimidation,* takes . . . any property . . . belonging to . . . any bank. . . ." 18 U.S.C. §2113(d) provides that "whoever, in committing . . . any offense defined in subsections (a) and (b) of this section, *assaults* any person, or *puts in jeopardy* the life of any person by the use of a dangerous weapon or device, shall be . . . imprisoned not more than twenty-five years". (Emphasis supplied.) The aggravated form of the offense is not merely the commission of the basic offense by use of a dangerous weapon, but the use of a dangerous weapon in committing the basic offense in such a way as to put in jeopardy the life of a person or assault a person by the use of a dangerous weapon.

The word "jeopardy" has in common parlance a connotation of actual danger, without regard to the mental state of the victim. To put a person in fear, through threats which a criminal does not have the present intention or ability of carrying out, does not necessarily put his life in jeopardy. The applicability of the common meaning of the word "jeopardy" is confirmed by its context in the statute.

The use of the phrase "puts his life in" makes it clear that "jeopardy" was not to be equated with "fear". See *United States* v. *Donovan*, 242 F.2d 61, 63 (2d Cir. 1957):

> "The ordinary dictionary definition of 'jeopardy,' however, suggests a different meaning. That term is commonly defined as referring to an objective state of danger, not to a subjective feeling of fear.[1] Doubtless, dictionary meanings are not always infallible guides, but that meaning is the one that best fits the phrasing of this statute. 'Jeopardy' appears in the phrase 'puts his life in jeopardy.' To construe that word as meaning 'fear' would result in the phrase 'puts his life in fear', which would indeed be a strange use of language. Persons are put in fear, lives are not; they are put in danger.
>
> The purpose of the statute and the ordinary meaning of 'jeopardy' proceed *pari passu*, and we are satisfied that 'jeopardy' means danger and not fear.
>
> 1. The Merriam-Webster New International Dictionary, 2d ed., gives this definition of 'jeopardy': 'Exposure to death, loss or injury; hazard; danger.'
>
> Almost identical is the definition in the Funk & Wagnalls New Standard Dictionary: 'Exposure to death, loss, or injury; danger; hazard.'
>
> The Oxford Dictionary, Vol. 5, p. 568, gives this definition: 'Risk of loss, harm, or death; peril, danger.'"

The statute uses "assaults" as an alternative to "puts in jeopardy". Clearly, "assaults", like "puts in jeopardy", is modified by the phrase "by the use of a dangerous weapon or device," for a simple assault is necessarily involved in

the commission of a robbery, and if "assaults" is unmodified then every robbery would be an aggravated offense under §2113(d). See *People* v. *Logan*, 41 Cal. 2d 279, 260 P.2d 20 (1953); 77 C.J.S. *Robbery* §1 (1952). Whatever may be the rule with respect to a simple assault or an assault "armed with a dangerous weapon", an assault "by the use of a dangerous weapon" requires the showing of an objective state of danger to the assailant's victim. See, *e.g.*, *Price* v. *United States*, 156 Fed. 950 (9th Cir. 1907); *People* v. *Wood*, 199 N.Y.S. 2d 342 (App. Div. 1960); Annotation, 74 A.L.R. 1206 (1931). Thus conviction under § 2113(d) whether based on "assaults" or "puts in jeopardy" requires a jury finding of objective peril.

What authority there is under § 2113(d) supports the conclusion that an objective state of danger is an essential element of the aggravated offense. *E.g.*, *Meyers* v. *United States*, 116 F.2d 601 (5th Cir. 1940), *aff'd per curiam on motion for rehearing*, 116 F.2d 603 (1941); *United States* v. *Gebhart*, 90 F. Supp. 509 (D. Neb. 1950). And recent cases under 18 U.S.C. § 2114, the mail robbery statute, where similar language appears, agree that the phrase refers to an objective state of danger. See *United States* v. *Donovan*, 242 F.2d 61 (2d Cir. 1957); *Wagner* v. *United States*, 264 F.2d 524, 530 (9th Cir. 1959), *cert. denied*, 360 U.S. 936, *petition for rehearing denied*, 361 U.S. 857:

> "We agree that the aggravated form of robbery described in the latter part of § 2114 as putting 'life in jeopardy by the use of a dangerous weapon' means more than a 'mere holdup by force or fear'. It must be a holdup involving the use of a dangerous weapon actually so used during the robbery that the life of the person being robbed is placed in an *objective* state of danger." (Emphasis supplied.)

In its instruction to the jury the trial judge referred six times to Count 3.

In the first two references he simply quoted or closely paraphrased § 2113(d), without seeking to explain its meaning:

> "What the government charges in that count, count 3, is they committed the robbery, the offense charged in count 2, in an aggravated manner. That is, they assaulted and put in jeopardy lives of certain persons by the use of a dangerous weapon" (No. 179, R. 9).

> "The third count with respect to the aggravated aspect of it, whoever, in committing or in an attempt to commit any of these offenses that I have already pointed out in these two sections, entering to rob and robbing, whoever committed these offenses, and assaults any person or puts in jeopardy, in danger, jeopardy means, the life of any person by the use of a dangerous weapon, and so forth, may be punished in accordance with the statute" (No. 179, R. 10).

By the next two references the trial judge indicated he believed—and led the jury to believe—that the only element necessary to establish aggravation was the use of a dangerous weapon:

> "So to sum up at the risk of repetition, we have three counts, first, entering with the intent to rob; second, the actual robbery of the bank; and third, committing the robbery set forth in the second count under aggravated circumstances, to wit, by the use of a dangerous weapon" (No. 179, R. 10-11).

> "Two persons, if a person or two persons point a pistol or pistols at a third person who has custody of the money while in close proximity to him or them, in con-

sequence of which the property or money in his care or their care is taken away and against their will, there can be no doubt that this amounts to robbery. That is practically a repetition of what I have said already—and a violation of the statute and also, as charged in count 3, the aggravation aspect, it amounts to an assault and putting in jeopardy the life of the person by use of a dangerous weapon" (No. 179, R. 11).

In the fifth reference, the court distinctly misdefined the aggravation by defining it in terms of "fear" rather than objective danger:

"Under count 3, the question is, did they rob the bank under aggravated circumstances, put in fear the life of a person by the use of a pistol?" (No. 179, R. 12).

This statement not only overrode any possibly helpful effects which the judge's reference to "danger" in the confusing second reference quoted above might have served; it also in effect—and particularly when taken with the third and fourth reference—directed the jury to find the petitioner guilty on the third count even though only the elements of the basic, rather than the aggravated, offense were found.

The sixth reference goes even further, by taking from the jury altogether any question about the element of aggravation:

"And then there is no contention in respect to the third count of the indictment, that whoever robbed that bank put in jeopardy the lives and the persons who had custody of that money by the use of a dangerous weapon. The evidence in the case pointed to that and counsel for the defense do not dispute that fact so we have those facts to put to one side" (No. 179, R. 15).

The case was defended on the ground that the defendants were not the robbers. The defense conceded that the robbery took place and that persons were placed in *fear* by the use of guns. But whether the aggravated offense was committed would depend upon the intent, readiness and ability of the robbers to fire their pistols. Whatever the evidence required to support a finding of the requisite intent and objective danger, the question must at least be put to the jury. The result of the court's withdrawing this question from the jury is that all the petitioner was convicted of was robbery using a dangerous weapon, which is nothing more than a form of the offense defined in § 2113(a) for which no increase in maximum punishment is authorized, and for which the maximum permissible sentence is twenty years.

C. *The Illegality of Twenty-Five Year Sentence Imposed by the Trial Court May Be Challenged by Petitioner's Motion under Rule 35.*

Rule 35 of the Federal Rules of Criminal Procedure provides that "the court may correct an illegal sentence at any time". It is perfectly clear in the light of *Prince* v. *United States*, 352 U.S. 322 and *Heflin* v. *United States*, 358 U.S. 415, that a motion under Rule 35 is a proper method for challenging the legality of multiple sentences under the bank robbery statute. Neither the Government in the court below nor that court itself questioned the availability of Rule 35 to raise this issue.

However, both courts below refused even to consider the substantive question whether, in view of the trial court's instructions in this case, a twenty-five year sentence was authorized for the conviction under Count 3. The theory for this refusal was that matters relating to instructions to the jury are reviewable on appeal and therefore are not

within the scope of things which may be examined on a motion under Rule 35. There are unquestionably strong reasons of policy why the outcome of a criminal trial, conviction or acquittal, should generally become final with reasonable promptness. See, *e.g.*, FED. R. CRIM. P. Rule 33 (motion for new trial must be made within two years if based on newly discovered evidence, otherwise within five days) and FED. R. CRIM. P. Rule 34 (motion for arrest of judgment must be made within five days or such further time as the court may fix during the five-day period). But FED. R. CRIM. P. Rule 35 provides specifically that a motion to correct an illegal sentence may be made at any time.

A jury verdict of conviction is actually entered in response not to the indictment but to the trial court's instructions. What the jury's verdict means can only realistically be ascertained by reference to the instructions. "The basis on which a jury convicts is authoritatively to be taken from what the judge tells the jury." *Rosenberg* v. *United States*, 346 U.S. 273, 303 (dissenting opinion of Frankfurter, J.). See also *Shelton* v. *United States*, 235 F.2d 951, 954 (4th Cir. 1956):

> "In view of the extraordinary circumstances above described, which make it uncertain whether the verdict of the jury was directed to the counts as they actually appeared in the indictment or to the counts as erroneously described by the judge, the verdict does not afford a sound basis for a valid judgment. We are unable to say beyond a reasonable doubt what were the precise charges that the jury had in mind in announcing its conclusions."

This Court has said that FED. R. CRIM. P. Rule 35 is for the correction of sentences "that the judgment of conviction did not authorize". *United States* v. *Morgan*, 346 U.S. 502,

506. Petitioner in this case does not seek a new trial or a redetermination of facts. He does not now challenge the validity of the jury verdict of conviction. His position is simply that the only offense put to the jury, and therefore, the only offense of which he stands convicted is unaggravated robbery, and that the maximum sentence authorized for that offense is twenty years. The validity of his claim can be ascertained from an examination of his trial record without the necessity of any further factual inquiry outside the record. Cf. *Ladner* v. *United States*, 358 U.S. 169. And relief in this branch of the case would be effectuated simply by reducing his sentence from twenty-five years to the statutory maximum of twenty years.

As the *Ladner* case shows, this Court has in the past looked behind the mere form of a judgment to find out the substance of a criminal conviction, even when that required the ascertainment of facts which could not be determined solely from the records of the trial court. Certainly in a case where a stenographic transcript is available, there is no reason to refuse, in effect, to look at it to determine the substance of what was done.

The court below stated that an error in the charge could have been raised on appeal. But obviously this is no bar to consideration under Rule 35. Any illegality of sentence could have been raised on appeal. Rule 35 stands broadly for the proposition that a sentencing error, amounting to illegality, which can be corrected without a retrial, can and should be corrected at any time. Cf. *Askins* v. *United States*, 251 F.2d 909 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 923.

Even if Rule 35 did not permit entertainment of this part of petitioner's claim, his argument should be heard as a motion under 28 U.S.C. § 2255, or as a motion in the nature of a writ of error *coram nobis*. Cf. *Heflin* v. *United States*,

358 U.S. 415; see *United States* v. *Morgan*, 346 U.S. 502. Petitioner is in custody under the twenty-five year sentence which he challenges and he is claiming the right to be relieved of that sentence. And, depending upon what action the trial court takes if his case is remanded for resentencing for failure to comply with Rule 32(a), he may have already served the term for which he is resentenced and therefore be entitled to release altogether. Even if his other sentences may prevent immediate release upon granting the relief he requests in this branch of his case, he is seeking release from custody under that sentence, and the effect of granting relief will be to enable him to be released entirely from federal custody at an earlier date than his present commitment would permit.

Conclusion

There is no area of the law where a higher standard of punctilious application of every applicable legal protection is called for than in sentencing. What the court below has done is at best to leave unaffected a slipshod and, at least in some respects, illegal imposition of punishment on the petitioner. It is respectfully submitted that to affirm the action of the lower courts in this case will inspire only disrespect for the law's processes by those charged with its administration and those affected by that administration.

To avoid further injustice to the petitioner, it is urged that, if the petitioner's case is remanded for resentencing, this Court's order provide that in resentencing the petitioner should be given full credit for time already served on the sentences under question, and that for purpose of good-time credits and parole regulations any new sentence imposed be deemed to run from the date of the original sentences. See, *e.g.*, *McDonald* v. *Moinet*, 139 F.2d 939, 941

(6th Cir. 1944); *McDonald* v. *Looney*, 238 F.2d 844, 845 (10th Cir. 1956); *Lewis* v. *Commonwealth*, 329 Mass. 445, 108 N.E. 2d 922 (1952); Annotation, 35 A.L.R. 2d 1283, 1288 (1954). Failure to give such credit would severely penalize petitioner for asserting his rights in an instance where the Court has the power to avoid such a penalty.

It is therefore respectfully submitted that this Court should reverse the judgments of the court below, and remand with directions that the district court bring the petitioner before it for resentencing, afford the petitioner an opportunity to make a statement in his own behalf pursuant to FED. R. CRIM. P. Rule 32(a), and resentence the petitioner for a term to end not more than twenty years from the date of his original commitment, such new sentence to be deemed, for purposes of good-time credits and eligibility for parole, to run from the time of his original commitment.

Respectfully submitted,

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November 1960

Appendix

18 U.S.C. § 2113

"§ 2113. Bank robbery and incidental crimes

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or

Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value knowing the same to have been taken from a bank, or a savings and loan association, in violation of

subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker.

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or punished by death if the verdict of the jury shall so direct.

(f) As used in this section the term 'bank' means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States, and any bank the deposits of which are insured by the Federal Deposit Insurance Corporation.

(g) As used in this section the term 'savings and loan association' means any Federal savings and loan association and any 'insured institution' as defined in section 401 of the National Housing Act, as amended, and any 'Federal credit union' as defined in section 2 of the Federal Credit Union Act."

FEDERAL RULES OF CRIMINAL PROCEDURE

"Rule 32. Sentence and Judgment.

(a) SENTENCE. Sentence shall be imposed without unreasonable delay. Pending sentence the court may commit the defendant or continue or alter the bail. Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.

(b) JUDGMENT. A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and

sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(c) PRESENTENCE INVESTIGATION.

(1) *When Made.* The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless the court otherwise directs. The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty.

(2) *Report.* The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the Court.

(d) WITHDRAWAL OF PLEA OF GUILTY. A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

(e) PROBATION. After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation as provided by law."

* * * * *

"Rule 35. Correction or Reduction of Sentence. The court may correct an illegal sentence at any time. The court may reduce a sentence within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari."

* * * * *

"Form 25. JUDGMENT AND COMMITMENT

In the United States District Court for the .....
District of ....., ... Division

UNITED STATES OF AMERICA)
)
v.) No. .....
)
.....)

JUDGMENT AND COMMITMENT

On this ..... day of ....., 19...., came the attorney for the government and the defendant appeared in person and[1] .....

It is Adjudged that the defendant has been convicted upon his plea of[2] ..... of the offense of .... as charged[3] .....; and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] .....
.....

---

[1] Insert 'by counsel' or 'without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel.'

[2] Insert (1) 'guilty', (2) 'not guilty, and a verdict of guilty', (3) 'not guilty, and a finding of guilty', or (4) '*nolo contendere*', as the case may be.

[3] Insert 'in count(s) number .....' if required.

[4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or

It is Adjudged that[5] .....

.....

It is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

.....,
United States District Judge.

The Court recommends commitment to:[6] .....

.....

.....,
Clerk.

[Endorsement]

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on ..... to .....

Defendant noted appeal on .....

Defendant released on .....

Defendant elected, on ....., not to commence service of the sentence.

Defendant's appeal determined on .....

Defendant delivered on ..... to ..... at ....., the institution designated by the Attorney General, with a certified copy of the within Judgment and Commitment.

.....,
United States Marshal."

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unserved sentence; (3) whether defendant is to be further imprisoned until payment of fine or fine and costs, or until he is otherwise discharged as provided by law.

[5] Enter any order with respect to suspension and probation.

[6] For use of Court wishing to recommend a particular institution.